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7 [Submitting Counsel on Signature Page]

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10  
11 IN RE: JUUL LABS, INC., MARKETING,  
12 SALES PRACTICES, AND PRODUCTS  
13 LIABILITY LITIGATION

Case No. 19-md-02913-WHO

**JOINT CASE MANAGEMENT  
CONFERENCE STATEMENT AND  
PROPOSED AGENDA**

14 This Document Relates to:

15 ALL ACTIONS  
16

17 Pursuant to Civil Local Rule 16-10(d), Federal Rule of Civil Procedure 26(f), the Court's  
18 February 14, 2020 Minute Order (Dkt. No. 370), counsel for Defendants JUUL Labs, Inc. ("JLI")  
19 and Altria<sup>1</sup> (collectively referred to as the "Undersigned Defendants"), and Plaintiffs' Co-Lead  
20 Counsel ("Plaintiffs") (collectively referred to herein as the "Parties") respectfully provide this  
21 Joint Case Management Statement in advance of the Further Case Management Conference  
22 scheduled for March 20, 2020.  
23  
24  
25  
26

27 <sup>1</sup> "Altria" refers to Altria Group, Inc., as well as the wholly-owned subsidiaries that have been  
28 named as defendants and served in at least one case: Philip Morris USA Inc., Altria Client  
Services, Altria Distribution Group, Nu Mark LLC and Nu Mark Innovations Ltd.

1    **I. PARTICIPANT INFORMATION**

2            Subject to any future orders of the Court, the conference will proceed telephonically and  
3    the parties will not appear in person. Anyone who wishes to attend the conference must dial in  
4    using the below conference line. Unless you are addressing the Court, please be sure your phone  
5    is on mute.

6            **Dial-In: 888-330-1716**

7            **Access Code: 470535**

8    **II. ISSUES TO BE DISCUSSED BELOW AND PROPOSED AGENDA**

- 9            • Status of Case Filings
- 10          • Discovery Status
- 11          • Case Management Developments and Issues
- 12          • Master Pleadings
- 13          • Briefing Schedule for Motions to Dismiss
- 14          • Joint Coordination Order
- 15          • Plaintiff and Defendant Fact Sheets
- 16          • Update re Federal/State Working Group and Liaisons
- 17          • ADR Status

18   **III. STATUS OF CASE FILINGS**

19            To date, 385 cases are pending in this MDL, naming 52 defendants. A list of these  
20    defendants is attached as **Exhibit A**. There also are 90 cases pending in JCCP 5052, which is  
21    assigned to Judge Ann I. Jones of the Los Angeles Superior Court as the Coordination Trial Judge.  
22    There are six defendants named in those cases.

23            The Parties are also aware of ten cases filed by state attorneys general across the country,  
24    specifically: California, Illinois, New York, North Carolina, Mississippi, Minnesota, Washington  
25    D.C., Arizona, Pennsylvania, and Massachusetts. Plaintiffs' Liaison Counsel are continuing their  
26    outreach to various State Attorneys General to discuss coordination with this MDL.

1 **IV. DISCOVERY STATUS**

2 The parties' Rule 26(f)-related meet and confers are continuing productively, including as  
3 to matters identified in the Northern District of California Guidelines for the Discovery of  
4 Electronically Stored Information.

5 **A. JLI Discovery Status**

6 During the parties' February 11, 2020 conference regarding ESI issues, Plaintiffs asked  
7 JLI to provide the search terms it has used when responding to discovery requests in connection  
8 with government investigations. On March 12, 2020, JLI provided the consolidated set of search  
9 terms it has used for the purposes of responding to all government investigations. Co-Lead  
10 Counsel is working with leadership in the JCCP to assess JLI's proffered search terms, and the  
11 parties' discussions are ongoing. On March 17, 2020 the MDL Plaintiffs served upon JLI and  
12 Altria their First Set of Requests for Production of Documents to Defendants and MDL Plaintiffs'  
13 First Set of Interrogatories to Defendants.

14 **Plaintiffs' Position:** During the March 12 meet and confer, Plaintiffs reiterated a request  
15 they have made repeatedly since the parties' initial meet and confers in November 2019: that JLI  
16 provide the identities of the government regulators that have sought documents or other  
17 information from JLI; identify which documents have been produced in connection with specific  
18 investigations; and produce copies of any document or other information requests served on JLI  
19 by government regulators, along with any related correspondence or record of communications  
20 between JLI and any given regulator. JLI has yet to respond to these requests.

21 **JLI's Position:** JLI has agreed to provide information regarding which documents  
22 produced in the MDL have been produced to which government regulators, provided that it is  
23 consistent with its commitments and obligations to specific regulators. JLI did not agree to  
24 produce copies of "any document or other information requests served on JLI by government  
25 regulators, along with any related correspondence or record of communications between JLI and  
26 any given regulator." However, it is considering this request and will meet-and-confer with  
27 Plaintiffs on this issue. JLI anticipates producing in the MDL an additional 50,000-60,000  
28 documents that it has recently produced to government regulators. JLI agrees that Rule 26(f)-

1 related meet and confers are continuing productively, including as to matters identified in the  
2 Northern District of California Guidelines for the Discovery of Electronically Stored Information.  
3 JLI is in receipt of Plaintiffs' First Set of Requests for Production of Documents to Defendants  
4 and Plaintiffs' First Set of Interrogatories to Defendants. JLI and the rest of the Undersigned  
5 Defendants were surprised by Plaintiffs' service of discovery on March 17, which was served  
6 without notice, and which seems largely addressed to issues about which the Parties have already  
7 been meeting and conferring. The Undersigned Defendants reserve all rights, and note that many  
8 requests appear facially improper because, among other things, they seek discovery on discovery,  
9 which is particularly non-productive and unfortunate given the ongoing meet-and-confer process  
10 that has, to date, productively addressed many of these subjects.

11 **B. Altria Discovery Status**

12 The parties have met and conferred. Altria has described to Plaintiffs the companies'  
13 email and document management systems. Plaintiffs asked Altria to confirm that no other  
14 systems used by Altria employees (such as any applicable instant messaging systems) were used  
15 for business purposes, and Altria's has agreed to continue to meet and confer on this question.

16 Altria has notified Plaintiffs' counsel that they have responded (or are in the process of  
17 responding) to requests for production from various government entities, and the documents that  
18 Altria has produced (and/or may produce) relate to the topics and categories of information that  
19 Plaintiffs have stated they intend to seek in discovery from Altria. Altria has provided Plaintiffs  
20 with a list of those topics and categories and Altria has stated it would be willing to produce those  
21 documents to Plaintiffs after Altria conducts a review of those documents for privilege and  
22 confidentiality. Plaintiffs have asked Altria: (1) whether the topics and categories that Altria has  
23 provided encompass all of the documents Altria produced to government entities, or only a subset  
24 of those productions; (2) for the search terms, custodians, and other collection methodologies  
25 used to collect documents in response to the government entities' requests; and (3) copies of any  
26 document or other information requests served on Altria by those government entities, along with  
27 any related responses and communications. Altria has agreed to continue to meet and confer on  
28 these questions. Plaintiffs have also requested that Altria provide the identities of the government

regulators that have sought documents or other information from Altria. While Plaintiffs believe that government productions provide a useful starting point for discovery, Plaintiffs do not believe that formal discovery of Altria in the MDL, such as service of written discovery and substantive discussions of custodians and search methodologies, should be delayed. Altria has indicated that once it produces the referenced documents and Plaintiffs have had an opportunity to review, the parties will discuss whether, and if so what, additional discovery Plaintiffs would like from Altria.

**C. PAX Discovery Status**

On March 5, 2020, Plaintiffs entered into a stipulated tolling agreement with Pax Labs Inc. (“Pax”). In exchange for the Plaintiffs agreeing not to name Pax as a defendant in any action at this time, Pax agreed to, among other things: (1) accept Plaintiffs’ subpoena for documents in its possession and produce responsive documents promptly; and (2) accept Plaintiffs’ subpoena and produce a witness pursuant to Fed. R. Civ. P. 30(b)(6). Pax was not named as a defendant in the Consolidated Master Complaint (Personal Injury) or Consolidated Amended Class Complaint. Plaintiffs will keep the Court apprised regarding developments with Pax.

**V. CASE MANAGEMENT DEVELOPMENTS AND ISSUES**

**A. Master Pleadings**

**Plaintiffs’ Position**

On March 10, 2020, Plaintiffs filed their Consolidated Master Complaint (Personal Injury) and the Consolidated Amended Class Complaint. The below chart identifies all of the Defendants named in the consolidated complaints, and indicates which of those entities and/or person had not previously been named as a defendant in any action in this MDL:

Defendants	Class Complaint	PI Master Complaint	Newly Named Defendant
Juul Labs, Inc., previously d/b/a as Pax Labs, Inc. and Ploom Inc.	X	X	
Altria Group, Inc.	X	X	

1	Philip Morris USA, Inc.	X	X	
2	Altria Client Services LLC	X	X	
3	Altria Group Distribution Company	X	X	
4	Altria Enterprises LLC		X	X
5	James Monsees	X	X	
6	Adam Bowen	X	X	
7	Nicholas Pritzker	X	X	X
8	Hoyoung Huh	X	X	X
9	Riaz Valani	X	X	X
10	Mother Murphy's Labs, Inc.		X	X
11	Alternative Ingredients, Inc.		X	X
12	Tobacco Technology, Inc.		X	X
13	Eliquitech, Inc.		X	X
14	Mclane Company, Inc.		X	X
15	Eby-Brown Company, LLC		X	X
16	Core-Mark Holding Company, Inc.		X	X
17	Chevron Corporation		X	X
18	Circle K Stores Inc.		X	
19	Speedway LLC		X	X
20	7-Eleven, Inc.		X	X
21	Walmart		X	X
22	Walgreens Boots Alliance, Inc.		X	X
23				

24 Service of the Consolidated Amended Class Complaint is underway as to the new  
25 defendants in that action only, and should be complete this week or next, accounting for current  
26 events. Counsel for Defendants Pritzker and Valani has reached out to Plaintiffs' counsel  
27 regarding waiver of service under Rule 4(d). With respect to the new defendants named in the PI  
28 Master Complaint, service will proceed pursuant to the process laid out in Proposed Case

1 Management Order No. 7. As discussed at the February Case Management Conference, the  
2 Government Entity/School District cases will not utilize master pleadings.

3 While traditionally Defendants do not have a say in the verbiage of a Plaintiff's complaint,  
4 on March 13, 2020, Plaintiffs sent Defendants a proposed Short Form Complaint for the Personal  
5 Injury Cases. A copy of the Proposed Short Form Complaint is attached as **Exhibit B**. The Short  
6 Form Complaint cautions Plaintiffs' counsel to exercise due diligence before checking off  
7 potential defendants to ensure they are appropriate to the particular case and that they do not  
8 destroy diversity jurisdiction. Defendants maintain below that the Short Form complaints do not  
9 satisfy the *Iqbal* and *Twombly* pleading requirements. By their analysis, there would never be  
10 short form complaints utilized in MDL. MDL Judges have rejected such arguments. An MDL  
11 Judge in the District of Maryland noted that "Each short-form complaint, usually but not  
12 always...expressly adopts the allegations made in the MACC. The purpose of the MACC was to  
13 provide a set of representative allegations that any individual allegedly injured by the BHR  
14 system may adopt to support their claims. It fulfilled that purpose here." See *In re Smith &*  
15 *Nephew Birmingham Hip Resurfacing* (BHR), 300 F.Supp.3d 732, 749 (D. Md. 2018). The MDL  
16 court went on to note that the failure to warn allegation that the defendant failed to apprise the  
17 FDA of adverse incidents and disseminated false information, was "more than enough to raise  
18 the plaintiffs' "right to relief above the speculative level", *id.* citing to *Twombly*.<sup>2</sup> Moreover, any  
19 such pleading objection could be raised in a motion and not as a basis to prevent the use of short  
20 form complaints or orders authorizing them.

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21 <sup>2</sup> See also *In re Zofran (Ondansetron) Products Liability Litigation* 2017 WL 1458193 at \*6 the MDL  
22 Court explained "It is true that this case, like most MDL proceedings, employs the device of a  
23 master complaint, supplemented by individual short-form complaints that adopt the master  
24 complaint in whole or in part. It is also true that a master complaint could not possibly be  
25 expected to include every case-specific detail, such as a particular misleading statement made by  
26 a particular sales representative to the physician of an individual plaintiff. See *In re Trasylol*,  
27 2009 WL 577726, at \*8. But the "complaint" in this proceeding is not a single document. The  
28 master complaint has no legal effect, standing alone; it has an effect only when it is adopted by a  
plaintiff through the filing of an individual complaint. In other words, the complaint in each  
action in this proceeding consists of the master complaint and the individual short-form  
complaint, taken together. See MDL Order No. 14 (Docket No. 243) (ordering that short-form  
complaints together with the applicable master complaint are "legally operative and binding as to  
that plaintiff"). The court also noted that individual fraud allegations could be pled specific to an  
individual plaintiffs' short form complaint.

1                   **The Undersigned Defendants' Position**

2                   **The Master Or Consolidated Complaints.** On March 11, 2020, Plaintiffs filed a Master  
3 Personal Injury Complaint and a Consolidated Class Complaint purportedly on behalf of a  
4 nationwide class and 51 separate state/district classes. (ECF Nos. 387, 388.) The Personal Injury  
5 Complaint spans 287 pages and 1057 paragraphs, and the Class Complaint spans 667 pages and  
6 3372 paragraphs. The Personal Injury Complaint identifies 24 potential defendants (at least 15 of  
7 which were not previously named in a case filed in or transferred to this MDL), and the Class  
8 Complaint identifies nine defendants (at least five of which were not previously named in any  
9 class complaint filed in or transferred to this MDL). The docket reflects that none of the newly-  
10 identified defendants ("New Defendants") named in these complaints has yet been served. Under  
11 Federal Rule of Civil Procedure 4(m), Plaintiffs have 90 days to effect service. Plaintiffs state  
12 they intend to complete service of the New Defendants named in the Consolidated Class  
13 Complaint this week, but they apparently will not attempt to serve the 15 New Defendants  
14 included on the Personal Injury Complaint until a Short Form Complaint and Enabling Order  
15 have been approved and until a case is filed naming those New Defendants at some unspecified  
16 time in the future.<sup>3</sup>

17                   The political subdivision plaintiffs have not yet amended any of their complaints, but have  
18 indicated that (a) they intend to amend their complaints, (b) they might add additional defendants,  
19 but also might not, and (c) they will file additional complaints on behalf of additional political  
20 subdivisions before the end of March. The Undersigned Defendants propose that the political  
21 subdivision plaintiffs be directed to amend their complaints and add any additional defendants by  
22 March 31, 2020, and that any New Defendants be served by April 13, 2020.

23                   A number of allegations and documents in the consolidated complaints were filed under  
24 seal because they contain information designated as confidential under the protective order in this  
25 action. Given the amount of such material and the current circumstances, the parties have agreed  
26

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27 <sup>3</sup> The procedure proposed by Plaintiffs raises a significant due process question with regard to  
28 whether an Enabling Order should be entered and applied to the New Defendants who have not  
had an opportunity to be heard with regard to the provisions of the proposed Enabling Order.



1 that additional time is warranted for Defendants to file papers supporting the sealing of such  
2 information under Local Rule 79-5. The parties have agreed to a deadline of 30 days after the  
3 filing of the consolidated complaints and the Court has entered an order granting the Parties'  
4 stipulation to that effect. (ECF No. 386.)

5 The Proposed Short Form Complaint: Defendants do not believe that the Short Form  
6 Complaint satisfies pleading requirements under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007),  
7 and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and reserve all rights to move to dismiss any or  
8 all such complaints as appropriate. None of the cases cited by Plaintiffs holds to the contrary.  
9 Contrary to Plaintiffs assertion above, the Undersigned Defendants are not suggesting that Short  
10 Form Complaints are never proper or have not been found to be proper in other cases. The  
11 Undersigned Defendants instead observe that, as proposed in this case, the SFC does not appear  
12 to satisfy pleading requirements, and that they are reserving all rights with respect to such  
13 deficiencies. Among other things, the proposed SFC does not identify the particular state law or  
14 laws under which each plaintiff purports to bring claims, nor does it require Plaintiffs to provide  
15 sufficient factual allegations to make such claims plausible in light of the required elements for  
16 such claims. To the extent a plaintiff purports to bring claims sounding in fraud or  
17 misrepresentation claims, the Short Form fails to meet the pleading requirements of Federal Rule  
18 of Civil Procedure 9(b). *See Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178, 1191 (N.D. Cal.  
19 2018) (granting motion to dismiss false advertising, CLRA, fraud, and UCL “and laws of similar  
20 states claims” where “plaintiffs have not identified which advertisements they saw during the  
21 class period, or where they saw them (outside of social media)).”

22 **B. Proposed Case Management Order No. 7**

23 **Plaintiffs' Position**

24 The parties have met and conferred over Proposed Case Management Order No. 7 (CMO  
25 7) regarding procedures for the *Master* and *Short Form Complaints* (SFC) in the Personal Injury  
26 Cases. The SFC adopts the factual allegations in the *PI Master Complaint* and allegations set  
27 forth in the *PI Master Complaint* which shall be deemed pled against all relevant parties named in  
28 each SFC. The SFC shall indicate the federal district in which the individual Plaintiff(s) originally

1 filed or would have originally filed their Complaint. CMO 7 provides that this process does not  
2 constitute any waiver of defendants' rights to dispute the legal validity of the claims alleged.  
3 CMO 7 provides deadlines requiring each Plaintiff with a case pending in this MDL as of the date  
4 of the Order to file a SFC by April 6, 2020 checking off each Defendant against whom Plaintiff is  
5 asserting claims. There would be twenty (20) day deadline from the date cases are transferred into  
6 this MDL to file a SFC into this MDL.

7 CMO 7 also provides that all Defendants named in the *Master Complaint*, including  
8 newly named defendants, need not answer or otherwise respond to any SFC filed in the MDL  
9 until ordered to do so by the Court. The proposed order provides that upon effectuated service of  
10 process, each newly named defendant shall promptly file an *Entry of Appearance* in this Court. It  
11 enables plaintiffs to file an action against newly named defendants directly in the MDL by using  
12 the *PI Master Complaint* which is deemed adopted into any filed SFC and spells out a procedure  
13 for service of process as to the newly named defendants as follows: by serving upon each newly  
14 named defendant named in a SFC, in accordance with Rule 4 of the Federal Rules of Civil  
15 Procedure the following: (a) a copy of the *PI Master Complaint*; (b) the SFC; (c) a copy of CMO  
16 7, and, (d) a Summons.

17 A copy of Proposed Case Management Order No. 7 is attached as **Exhibit C**. Notably  
18 Defendants object to this order because the newly named defendants are not present to object to  
19 it, but this is the mechanism by which to efficiently bring in the new defendants to the case and  
20 once they appear, they can voice their objections and file any appropriate motions.

21 **The Undersigned Defendants' Position**

22 Plaintiffs' proposed Enabling Order would apply to and bind 24 defendants. To the  
23 Undersigned Defendants' knowledge, 15 of those Defendants have never been named in a  
24 complaint in this litigation and have not been served with any personal injury complaint. The  
25 Undersigned Defendants believe it is premature to consider, argue the merits of, or adopt the  
26 proposed Enabling Order or Short Form Complaint without input and coordination from these  
27 New Defendants. The Undersigned Defendants believe there are serious problems with the  
28

1 proposed Short Form Complaint, including that it suggests that Plaintiffs can avoid providing  
2 facts required to satisfy Federal Rules of Civil Procedure 8(a) and 9(b).

3 **C. Class Plaintiffs' Parallel Personal Injury Claims**

4 **Plaintiffs' Position**

5 The class plaintiffs allege claims on behalf of themselves and other class members seeking  
6 recovery of economic losses associated with their JUUL purchases. Certain of the proposed class  
7 representatives may, in addition, seek to separately recover for personal injuries they suffered.  
8 The class complaint expressly states that the class representatives and proposed class(es) do not,  
9 through the causes of action asserted in the class complaint, seek damages or other relief as a  
10 result of personal injuries. *See* Consolidated Class Action Complaint Section IX. Co-lead counsel  
11 instead anticipate that any class representatives' personal injury claims will be advanced through  
12 the personal injury master complaint and subsequent short-form complaints. *Id.* To head off  
13 confusion or inefficiencies, Plaintiffs' counsel explained this plan to counsel for Defendants  
14 before the complaints were filed, and asked for confirmation that Defendants agree that the class  
15 representatives' personal injury claims (1) are not waived by virtue of the filing of the economic-  
16 loss class complaint, and (2) may be asserted by way of later-filed short-form complaints (or  
17 tolled pursuant to agreement of the parties). Defense counsel suggested that the parties discuss  
18 this issue after the filing of the complaints. While Plaintiffs do not anticipate requiring the Court's  
19 assistance on this issue at this time, all Plaintiffs expressly reserve and do not waive their rights to  
20 later assert, or request leave to assert, causes of action and claims that are not alleged in the  
21 complaints served on March 10, 2020. If Defendants wish to raise any objection or waiver  
22 argument concerning Plaintiffs' approach to asserting these parallel claims, Plaintiffs wish to  
23 resolve those issues as promptly as possible.

24 **The Undersigned Defendants' Position**

25 The Plaintiffs appear to seek an advisory ruling. No class representative has yet filed a  
26 personal injury claim, so far as the Undersigned Defendants know. Thus, there is no ripe issue  
27 for the Court to address. Moreover, as the Undersigned Defendants have noted previously, there  
28 are many New Defendants who have not yet been served, and who have not appeared, yet who

1 have a right to be heard on this and many other issues. It would be premature for the Court to  
2 issue an advisory opinion on an issue that is not ripe, that has not yet been joined, and as to which  
3 many potentially interested parties have not yet been heard. There is no reason to reach this issue  
4 now. The Undersigned Defendants reserve all their rights and defenses with regard to such  
5 claims, should they be asserted in the future.

6 **D. Government Entities**

7 **Plaintiffs' Position**

8 Currently, 56 government entities from 14 states have complaint on file in the MDL. By  
9 March 31, Plaintiffs anticipate that there will be over 64 government entities with complaints on  
10 file in the MDL – including 16 counties from eight different states (CA, CO, IL, KY, MD, NH,  
11 WA, and WV), and forty-eight school districts from ten states (AZ, CA, FL, KS, KY, MO, MS,  
12 NY, PA, and WA). Plaintiffs believe that this existing group of government entities is adequate  
13 to select bellwethers for purposes of filing operative complaints and preparing cases for possible  
14 trial.

15 Plaintiffs propose meeting and conferring with defendants to identify the appropriate  
16 bellwethers. If the parties cannot agree, then the parties would submit competing proposals to the  
17 Court. After the bellwethers have been selected, those bellwethers would file amended  
18 complaints that would be subject to motions to dismiss. The selection of bellwethers followed by  
19 an opportunity to amend the bellwether's complaints and then motion to dismiss briefing focused  
20 on those bellwethers is the process that was adopted by Judge Polster for use in the national  
21 Opiate MDL, and Plaintiffs believe it should be applied here. *See In re National Prescription*  
22 *Opiate Litigation*, No. 17-md-2804-DAP, Doc. # 32, pp. 2-4 (April 11, 2018) (setting out  
23 amendment and briefing schedule for specified bellwethers in Case Management Order One).  
24 (Attached as **Exhibit D.**) Those entities that are not selected as bellwethers could file amended  
25 complaints in due course.

26 Defendants' proposal, that all 56 complaints currently on file be amended prior to  
27 bellwether selection occurring, is inefficient and would unreasonably burden counties and school  
28 districts—government entities that are already experiencing increased burdens in light of the

1 coronavirus pandemic. Defendants do not require amended complaints to meaningfully engage in  
2 the bellwether selection process. Based on the complaints already on file, the defendants know  
3 the identities of the government entities that are asserting claims, the state laws that govern those  
4 claims, and the general legal theories that are being advanced by the government entity. While  
5 there is additional factual material to be added, particularly regarding Defendants' conduct,  
6 Defendants are already aware of much of this material from the amended class action and  
7 personal injury complaints. In addition, Plaintiffs do not envision naming defendants in the  
8 government entity complaints beyond those that have already been served with existing  
9 complaints or are in the process of being served by the master class or personal injury complaints.

10 It is unlikely that all of the government entities will be able to file amended complaints by  
11 March 31st. The practical consequence of Defendants' proposal will be to further delay the  
12 bellwether selection process, and the subsequent motion to dismiss briefing. Plaintiffs  
13 respectfully submit that there needs to be a balance between moving this critical litigation  
14 forward while being sensitive to the demands being placed on our counties and school systems.  
15 Moving forward with bellwether selection, followed by briefing on selected bellwethers, strikes  
16 the appropriate balance.

### 17 **The Undersigned Defendants' Position**

18 The government entity plaintiffs have not yet amended any of their 56 complaints, but  
19 have indicated that (a) they intend to amend their complaints, (b) they might add additional  
20 defendants, but also might not, and (c) they will file additional complaints on behalf of additional  
21 political subdivisions before the end of March. The Undersigned Defendants propose that the  
22 government entity plaintiffs be directed to amend their complaints and add any additional  
23 defendants by March 31, 2020, and that any newly-named defendants be served by April 13,  
24 2020.

25 In response, the government entity plaintiffs claim that they lack the resources to file  
26 amendments that would set forth the claims upon which they intend to proceed in this case. At  
27 least two facts appear to contradict their position. First, most if not all of the government entities  
28 are represented by contingent fee counsel, and thus are incurring no expenses in connection with

1 this litigation. Second, if all the government entities intend to do is to copy material from the  
2 Master Complaints, there should be little cost or expense entailed in doing so.

3 The balance the Court should strike is a balance that will ensure that the Undersigned  
4 Defendants are fully apprised of the claims asserted against them, and that they have a full and  
5 fair opportunity to test the legal sufficiency of those claims. What the government entities  
6 propose does not provide that opportunity and does not comport with the requirements of due  
7 process.

## 8 **VI. SCHEDULE FOR RULE 12 MOTIONS**

### 9 **Plaintiffs' Position**

10 The Court has stated its goal of ruling on contemplated Rule 12 motions by mid-  
11 September 2020. ECF 370. Plaintiffs propose the following schedule for a first wave of Rule 12  
12 motions:

13 <b>Date</b>	14 <b>Event</b>
15 May 22, 2020	Deadline to file first wave of Rule 12 motions
16 June 22, 2020	Deadline to file oppositions to first wave of Rule 17 12 motions
18 July 13, 2020	Deadline to file replies in support of first wave of 19 Rule 12 motions
20 August 17, 2020 21 or after (subject to Court availability)	Hearing on first wave of motions to dismiss

22 Plaintiffs agree with Defendants' suggestion that Rule 12 briefing should "take into  
23 account certain cross-cutting issues first," including preemption and primary jurisdiction. At the  
24 February 14, 2020 Case Management Conference, the Court directed that "the preemption and  
25 primary jurisdiction issues [be] teed up as soon as they can be teed up for me, so that I can  
26 address the issue from a legal perspective.... I would like to deal with those issues soon." Tr.  
27 2/14/2020 CMC at 4-5. The Court directed that the "parties shall work out a schedule" on  
28 "selected motions to dismiss for the Court's consideration at the March 20, 2020 Case

1 Management Conference.” ECF 370. Defendants’ proposal does not meet the Court’s  
2 expectation to essentially resolve the pleadings by September, and instead front-loads resolution  
3 of hypothetical case-specific personal jurisdiction motions involving defendants who have not yet  
4 appeared. Plaintiffs do not agree with this approach, which violates Rule 1.

5 Plaintiffs recognize that new Defendants have been named in the complaints filed on  
6 March 10, and that those newly-named Defendants may wish to join pending Rule 12 briefing or  
7 file their own motions. Plaintiffs anticipate that the newly named defendants in the Consolidated  
8 Amended Class Complaint will be served imminently and will have retained counsel before the  
9 next status conference. That Plaintiffs have named additional Defendants is no surprise, as  
10 Plaintiffs disclosed their intention to do so in early January 2020. ECF 350. In any event, the  
11 newly-named Defendants will not be prejudiced by entry of a briefing schedule and the  
12 advancement of basic case management issues, about which all parties are free to object or make  
13 suggestions.

14 Defendants incorrectly suggest that the Court must resolve issues related to personal  
15 jurisdiction “at the outset” and before the parties can even brief any other Rule 12 issues. A court  
16 must of course determine that it has jurisdiction before it issues any decisions on the merits as to a  
17 particular defendant, but it does not follow that all other Rule 12 briefing must await those  
18 determinations. Rule 12 motions raising personal jurisdiction and other Rule 12 grounds for  
19 dismissal are common. And a party waives personal jurisdiction only “by omitting it from its first  
20 Rule 12(b) motion.” *AT&T v. Teliix, Inc.*, 2016 WL 4241910, at \*2 (N.D. Cal. Aug. 11, 2016)  
21 (citing Fed. R. Civ. Proc. 23(h)). There is therefore no impediment to Defendants contesting  
22 personal jurisdiction while also raising (or joining) arguments concerning preemption, primary  
23 jurisdiction, and any other defenses in their initial Rule 12 motions.

24 In the meantime, the Defendants that have appeared in the MDL should file their  
25 contemplated motions promptly, particularly as to those “cross-cutting issues” that Defendants  
26 have already identified as potentially dispositive.

1                   **The Undersigned Defendants' Position**

2           The Undersigned Defendants continue to digest the nearly one-thousand pages of  
3   allegations in the Complaints, and believe certain threshold issues may impact the briefing  
4   schedule, including the addition of a multitude of New Defendants—most of whom have not  
5   appeared in these matters and have apparently not yet been served, and all of whom presumably  
6   will expect and are entitled to time to digest and consider the Complaints and potential briefing  
7   schedules that will impact the claims against them. Moreover, it appears that some New  
8   Defendants may have grounds for motions pursuant to Rules 12(b)(1), (2), and (3), at least some  
9   of which must, in order to be preserved, be filed at the outset of the case. *See* Fed. R. Civ. P.  
10   12(h)(1); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998). A feasible and  
11   efficient schedule for Rule 12 motions should not be set until Plaintiffs have served the New  
12   Defendants.

13           On January 13, 2020, The Court adopted a schedule requiring defendants to  
14   provide notice “of Rule 12 motions within 30 days of the filing of the complaints,” after which  
15   the parties would the “propose a briefing schedule for those motions.” (ECF. No. 356.) On  
16   February 14, 2020, the Court further directed the parties “to file an agreed-to or disputed briefing  
17   schedule for the selected motions to dismiss for the Court’s consideration at the March 20, 2020  
18   Case Management Conference.” (ECF. No. 370.)

19           It is inappropriate and inefficient to set a briefing schedule without input from parties who  
20   have been newly-added to the litigation, but apparently have not yet been served. It is likely that  
21   many of these New Defendants will have an interest in the motions that are likely to be brought  
22   by the Undersigned Defendants and likely will have their own motions to bring. The New  
23   Defendants thus have an interest in, and right to be part of, the process for determining the  
24   schedule by which such motions will be heard and decided.

25           Although the Undersigned Defendants can speak only for themselves and not for the other  
26   defendants, it appears highly likely that defendants will have viable Rule 12 motions, and perhaps  
27   other preliminary motions as well, under at least the following legal theories:  
28



- 1 (a) **Personal Jurisdiction.** New Defendants should be permitted to file  
2 motions under Rules 12(b)(1), (2), (3), (4), and (5) (referred to collectively  
3 as “Personal Jurisdiction Motions” for ease of reference) before being  
4 required to file motions concerning the merits of Plaintiffs’ claims. *See*  
5 *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431  
6 (2007). The Undersigned Defendants therefore suggest that Plaintiffs be  
7 directed to serve the newly-named defendants by April 13, 2020.  
8 Thereafter, any New Defendants not served by that date should be  
9 dismissed unless Plaintiffs show good cause for their failure to effect  
10 service. The New Defendants who were served should have until May 29,  
11 2020, to file any Personal Jurisdiction Motions. Plaintiffs would then have  
12 until July 27, 2020 to file any opposition to these motions, and any  
13 defendant filing such a motion would have until August 26, 2020 to file a  
14 reply, with a hearing to be set at the Court’s convenience, likely in or  
15 about September 2020.
- 16 (b) **Primary Jurisdiction and Preemption.** The Undersigned Defendants  
17 intend to file Rule 12 motions based upon primary jurisdiction and federal  
18 preemption (referred to collectively as “Primary Jurisdiction and  
19 Preemption Motions”). These motions cut across all complaints and apply  
20 to some or all of the claims in the two Consolidated Complaints and the  
21 political subdivision cases as they are currently pled. Consistent with the  
22 Court’s guidance, the Undersigned Defendants propose that these motions  
23 be filed early. In particular, the Primary Jurisdiction and Preemption  
24 Motions would be filed just after the Personal Jurisdiction Motions  
25 outlined in subparagraph (a) above and concurrently with Altria’s Motion  
26 to Dismiss described in subparagraph (c) below, on June 12, 2020, and  
27 Plaintiffs’ opposition would be due on July 27, 2020, and Defendants’  
28 reply would be due on August 26, 2020, as set out in the table below. The

Undersigned Defendants expect that the ruling on their primary jurisdiction and preemption motions will significantly narrow the issues before the Court, resolve – at least until the FDA acts on JLI’s Premarket Tobacco Application – many claims asserted by Plaintiffs, and shape the litigation to allow it to be more efficiently managed going forward.

(c) **Altria’s Motions to Dismiss Plaintiffs’ Claims Against Altria in the Master Personal Injury Complaint and the Consolidated Class Action Complaint (“Altria’s Motions to Dismiss”).** Altria believes that both the Master Personal Injury Complaint and Consolidated Class Complaint fail to state any claim against Altria for numerous, independent reasons and that Altria therefore should be dismissed. These arguments also should be resolved at the outset. Indeed, even if a small number of JUUL purchasers or users can state a claim against Altria that survives dismissal, resolving the issues likely be raised in these motions to dismiss would narrow and clarify the issues to be addressed at later stages in these proceedings, such as discovery and class certification. The Undersigned Defendants therefore propose that Altria be permitted to file motions under Rule 12(b)(6) against the Master Personal Injury Complaint and Consolidated Class Action Complaint by June 12, 2020. These Motions would focus on arguments specific to Altria raised by these two complaints and be made without prejudice to Altria’s ability to file or join additional motions to dismiss. The briefing schedule for Altria’s Motions to Dismiss would be the same as the schedule for the Primary Jurisdiction and Preemption Motions, with oppositions due July 27, 2020 and reply briefs due August 26, 2020.

(d) **Other Significant Rule 12(b)(6) Motions.** In addition to the preceding Motions, which the Undersigned Defendants believe should eliminate or substantially narrow the case, additional motions under Rule 12(b)(6)

1 should further eliminate certain claims and further narrow and streamline  
2 these cases (collectively referred to as “Other 12(b)(6) Motions”).  
3 Plaintiffs have asserted numerous causes of action, including a putative  
4 class claim for common-law fraud; claims for violations of the Racketeer  
5 Influenced and Corrupt Organizations Act; claims under the Magnuson-  
6 Moss Warranty Act; and claims under 50 states’ consumer laws, including  
7 individual states’ consumer protection acts, fraud, and other miscellaneous  
8 claims. It is highly likely that a significant expansion of page limits will  
9 be necessary to address these issues, and it will be difficult, if not  
10 impossible to address these issues in a single, comprehensive Motion.  
11 Moreover, because service is not complete, the Undersigned Defendants  
12 have not coordinated with the New Defendants about the most efficient  
13 way to bring these Other 12(b)(6) Motions before the Court. Thus, the  
14 Undersigned Defendants propose that the specific structure and  
15 coordination of these motions be deferred until a later date. At this time,  
16 however, the Undersigned Defendants propose that a parallel, but  
17 sequenced schedule be tentatively adopted by the Court for handling these  
18 Other 12(b)(6) Motions. Specifically, the Undersigned Defendants  
19 propose that they file their first set of Other 12(b)(6) Motions by July 27,  
20 2020, and that the New Defendants file their first set of Other Rule  
21 12(b)(6) Motions by the later of August 14, 2020, or 14 days after the  
22 ruling on the Personal Jurisdiction Motions described in subparagraph (a)  
23 above.<sup>4</sup> Plaintiffs’ oppositions to these motions shall be due 45 days after  
24 the motions are filed and Defendants’ reply papers shall be due 30 days  
25

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26 <sup>4</sup> The Undersigned Defendants further propose that, once the New Defendants have appeared, all  
27 Defendants will meet and confer with Plaintiffs regarding which specific motions will be included  
28 in the first wave of Other 12(b)(6) Motions to be presented to the Court on this proposed  
schedule.

thereafter. Briefing on these Other 12(b)(6) Motions should be complete by the end of October under this schedule.<sup>5</sup>

In sum, the Undersigned Defendants propose the following briefing schedule:

Action	Date
Political Subdivision Plaintiffs to Have Filed and Served Amended Complaints	March 30, 2020
All Plaintiffs (including Political Subdivision Plaintiffs) to Have Served or Dismissed All Defendants	April 13, 2020
<b>Personal Jurisdiction Motions</b> (defined above) with regard to all complaints served by April 13, 2020	May 29, 2020
Oppositions to Personal Jurisdiction Motions	June 29, 2020
Replies in support of Personal Jurisdiction Motions	July 29, 2020
Hearing on Personal Jurisdiction Motions and Altria's Motion to Dismiss	At the Court's convenience
<b>Primary Jurisdiction and Preemption Motions</b> (defined above) as to all complaints and <b>Altria's Motion to Dismiss</b> (defined above)	June 12, 2020
Oppositions to Primary Jurisdiction and Preemption Motions and Altria's Motion to Dismiss	July 27, 2020
Replies in support of Primary Jurisdiction and Preemption Motions and Altria's Motion to Dismiss	August 26, 2020
Hearing on Primary Jurisdiction and Preemption Motions	October 2, 2020, or at the Court's convenience
<b>Other 12(b)(6) Motions</b> (defined above) by JLI, Altria, and PM USA as to all complaints served by April 13, 2020 – first wave	July 27, 2020
<b>Other 12(b)(6) Motions</b> (defined above) by	August 14, 2020, or 14 days after the ruling on

<sup>5</sup> Unless amended complaints will be later filed, the Undersigned Defendants anticipate that the Court would hold a Further Case Management Conference shortly after ruling on these Other 12(b)(6) Motions and would, at that time, establish a schedule for further motions, picking up on rulings on the first wave of Other 12(b)(6) motions, or establish a deadline for the filing of answers.

New Defendants as to all complaints served by April 13, 2020 – first wave	the Personal Jurisdiction Motions, whichever is later
Oppositions to Other Rule 12(b)(6) Motions	45 days after motions are filed
Replies in support of Other Rule 12(b)(6) Motions	30 days after opposition are filed
Hearing on Other Rule 12(b)(6) Motions	30 days after reply papers are filed, at the Court's convenience

This briefing schedule has the advantage of resolving significant legal issues in an efficient, fair way. (*See* FRCP 1) It also respects Defendants' due process rights without impairing Plaintiffs' rights. It does have the disadvantage of sequencing briefing on the Other 12(b)(6) Motions before the Primary Jurisdiction and Preemption Motions have been decided, but the trade-off is to resolve the preliminary motions earlier than if the motions were filed and resolved entirely sequentially.

#### **VII. JOINT COORDINATION/COOPERATION ORDER**

The Parties all agree a Joint Coordination or Cooperation Order should be entered to establish efficient and fair methods for the MDL to work with parallel litigations. The parties have some disagreement as to the details, but have agreed that by April 2, the parties will submit either joint or if necessary, competing orders, which can be entered by the April 13 Case Management Conference.

#### **VIII. PLAINTIFF AND DEFENDANT FACT SHEETS**

After exchanging initial drafts, the Parties met and conferred for several weeks regarding Plaintiff and Defendant Fact Sheets pertaining to personal injury claims. On February 20, 2020, Judge Corley held an informal discovery conference to address the competing proposals and provide guidance to the parties in an effort to resolve their outstanding disputes. Heeding Judge Corley's guidance, the Parties engaged in several additional rounds of discussions and were able to narrow the issues in dispute, and then ultimately reach a compromise. The Proposed Plaintiff

1 Fact Sheet is attached as **Exhibit E**, the Proposed Defense Fact Sheet<sup>6</sup> is attached as **Exhibit F**  
2 and the Proposed CMO No. 8, the Proposed Fact Sheet Implementation Order, is attached as  
3 **Exhibit G**.

4 **IX. FEDERAL/STATE WORKING GROUP AND LIAISONS**

5 Plaintiffs agree with the Undersigned Defendants that having a Cooperation Order and  
6 deposition protocol entered before or at the next Case Management Conference will promote  
7 efficiency and economy. Plaintiffs have been engaging in ongoing discussions with the newly-  
8 appointed JCCP leadership regarding these matters, as described further above. Plaintiffs will be  
9 prepared to discuss the status of these discussions at the Conference or at such other time as the  
10 Court desires.

11 **X. ADR**

12 Pursuant to Civil Local Rule 16-10(d), the parties report that ADR is not yet appropriate  
13 given the preliminary state of the proceedings.

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27 <sup>6</sup> Only the Undersigned Defendants have participated in preparing the Proposed Defense Fact  
28 Sheet and none of the New Defendants or other defendants who have not yet been served or  
appeared have been involved or their concerns, if any, heard.

1 Dated: March 20, 2020

Respectfully submitted,

2  
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